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Google LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

DAVID LANDFAIR and SAMUEL M.
GERSHMAN, individually and on behalf of all
others similarly situated,

Plaintiff,

vs.

GOOGLE LLC,

Defendant.

Case No.

NOTICE OF REMOVAL

[Removed from Santa Clara County
Superior Court, Case No. 22CV405052]

**TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA:**

PLEASE TAKE NOTICE that Defendant Google LLC (“Google”) hereby removes *Landfair, et al. v. Google LLC*, Case No. 22-CV-405052 from Santa Clara County Superior Court to the United States District Court for the Northern District of California on the grounds stated below. Copies of this Notice of Removal are being served on Plaintiffs David Landfair and Samuel M. Gershman (collectively, “Plaintiffs”), Plaintiffs’ counsel, and also filed with the Clerk of Santa Clara County Superior Court, as required by Section 1446 of Title 28 of the United States Code.

I. INTRODUCTION

1. On September 30, 2022, Plaintiffs filed a complaint (the “Complaint”) on behalf of two putative classes against Google in Santa Clara County Superior Court under the caption *Landfair, et al. v. Google LLC*, Case No. 22-CV-405052. Google was served with the Complaint on October 24, 2022.

2. Plaintiffs allege that Google engaged in unlawful retention of its customers’ video rental history and other personal information in violation of the New York Video Consumer Privacy Act, N.Y. General Business Law (“GBL”) §§ 670–675 (“NYVCPA”) and Minnesota’s M.S.A. § 3251.01–03. *See, e.g.*, Compl. (attached hereto as Exhibit A) ¶¶ 1, 63, 74. Plaintiffs seek minimum statutory damages of \$500 per class member as well as prejudgment interest, costs, and attorneys’ fees. *See id.* ¶¶ 66, 77; *see also id.* at 10–11.

3. Plaintiffs styled the Complaint as a “Class Action” and seek to represent and have the following classes certified:

- The New York Class: “Plaintiff Landfair seeks to represent all New York residents who (a) rented a video from Google through Google Play wherein (b) Google retained for more than 65 days their personally identifiable information, including information that identifies the person as having requested or obtained specific video materials or services, and (c) without their consent.” Compl. ¶ 48.

- The Minnesota Class: “Plaintiff Gershman seeks to represent a class of all Minnesota residents who (a) rented a video from Google through Google Play wherein (b) Google retained for more than 65 days their personally identifiable information, including information that identifies the person as having requested or obtained specific video materials or services, and (c) without their consent.” *Id.* ¶ 49.

II. REMOVAL UNDER THE CLASS ACTION FAIRNESS ACT OF 2005

4. Under Section 1441(a) of Title 28 of the United States Code, “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.”

5. Under the Class Action Fairness Act of 2005 (“CAFA”), United States district courts have original jurisdiction over purported class actions in which the number of members in the proposed class is at least 100; at least one plaintiff is diverse in citizenship from any defendant; and the aggregate amount in controversy exceeds \$5,000,000. *See* 28 U.S.C. § 1332(d).

6. As set forth more fully below, Google may remove this case to this Court because (1) the putative classes includes at least 100 putative class members; (2) at least one member of the putative classes is a citizen of a State different from at least one defendant; and (3) the amount in controversy alleged exceeds \$5,000,000.

A. The putative classes include at least 100 putative class members.

7. A class action is removable under CAFA if the “number of members of all proposed plaintiff classes” is greater than or equal to 100. 29 U.S.C. § 1332(d)(5)(B). Plaintiffs allege that “members of the Class number in the millions.” Compl. ¶ 50. The putative classes therefore exceed 100 members.

B. There is minimal diversity.

8. A class action is removable under CAFA if “any member of a class of plaintiffs is a citizen of a State different from any defendant.” 28 U.S.C. § 1332(d)(2)(A). The putative classes

1 consist of “New York residents” and “Minnesota residents.” Compl. ¶¶ 48, 49. Google is a
 2 Delaware limited liability company and a subsidiary of XXVI Holdings Inc., which, in turn, is a
 3 subsidiary of Alphabet Inc., with its principal place of business in Mountain View, California.
 4 Thus, CAFA’s minimum diversity requirement is satisfied because Defendant Google and the
 5 members of Plaintiffs’ proposed classes are citizens of different states.

6 **C. The amount in controversy exceeds \$5,000,000.**

7 9. A class action is removable under CAFA if the “matter in controversy exceeds the
 8 sum or value of \$5,000,000, exclusive of interest and costs[.]” 28 U.S.C. § 1332(d)(2). A notice
 9 of removal “need include only a plausible allegation that the amount in controversy exceeds the
 10 jurisdictional threshold.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81
 11 (2014); *see also Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015) (noting that
 12 “Congress intended CAFA to be interpreted expansively” and that a notice of removal need
 13 include only a plausible allegation that the amount in controversy exceeds the jurisdictional
 14 threshold and need not contain evidentiary submissions, even if a plaintiff affirmatively contends
 15 in the complaint that damages do not exceed \$5,000,000).

16 10. The amount in controversy under CAFA takes into account more than damages.
 17 Where the statutes at issue authorize them—as Plaintiffs allege the NYVCPA and the Minnesota
 18 Statute do here—attorneys’ fees are also included in the amount in controversy for CAFA
 19 purposes. *See Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998).

20 11. Plaintiffs allege minimum statutory damages in the amount not less than of \$500 per
 21 class member. Compl. ¶¶ 66, 77. Plaintiffs also allege that the members included within the
 22 classes “number in the millions.” *Id.* ¶ 50. At \$500 per class member, the alleged amount in
 23 controversy easily exceeds \$5,000,000. Moreover, Plaintiffs also seek attorneys’ fees. *Id.* ¶¶ 66,
 24 77.

25 **III. ALL PROCEDURAL REQUIREMENTS FOR REMOVAL HAVE BEEN**
 26 **SATISFIED**

27 12. Pursuant to Section 1446 of Title 28 of the United States Code, copies of this Notice
 28 of Removal, along with a Notice to the Clerk of Santa Clara County Superior Court and Adverse
 Parties of Removal to Federal Court, are being served on Plaintiffs and Plaintiffs’ counsel, and are

1 also being filed with the Clerk of Santa Clara County Superior Court. A true and correct copy of
 2 the Complaint served on Google in the state-court action is attached hereto as **Exhibit A**.

3 13. Section 1446(b) of Title 28 of the United States Code identifies two thirty-day
 4 periods for removing a case. *See Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1139
 5 (9th Cir. 2013); *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 885 (9th Cir. 2010). The
 6 first thirty-day removal period is triggered if the case stated by the initial pleading is removable on
 7 its face. *Kuxhausen*, 707 F.3d at 1139. The second thirty-day removal period is triggered if the
 8 initial pleading does not indicate that the case is removable, and the defendant receives “a copy of
 9 an amended pleading, motion, order or other paper” from which removability may first be
 10 ascertained. *Carvalho*, 629 F.3d at 885 (quoting Section 1446(b)). Here, the Complaint is
 11 removable on its face, and Google has filed this Notice of Removal within thirty days of the date
 12 by which Google was served with the Complaint (October 24, 2022). Removal is therefore timely
 13 in accordance with Section 1446(b).

14 14. Venue is proper in this Court pursuant to Sections 1441(a) and 1446(a) of Title 28 of
 15 the United States Code because the United States District Court for the Northern District of
 16 California is the federal district embracing Santa Clara Superior Court, where the state court
 17 action was originally filed.

18 **IV. CONCLUSION**

19 15. By this Notice of Removal, Google does not waive any objections it may have as to
 20 service, jurisdiction or venue, or any defenses or objections it may have to this action. Google
 21 intends no admission of fact, law, or liability by this Notice, and expressly reserves all defenses
 22 and motions.

23 Dated: November 22, 2022

WILLKIE FARR & GALLAGHER LLP

25 By: /s/ Benedict Y. Hur
 26 Benedict Y. Hur
 27 Simona Agnolucci
 Joshua Anderson
 Erica S. Miranda

28 *Attorneys for Defendant Google LLC*

EXHIBIT A

E-FILED
9/30/2022 4:56 PM
Clerk of Court
Superior Court of CA,
County of Santa Clara
22CV405052
Reviewed By: L. Wang

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

DAVID LANDFAIR and SAMUEL M.
GERSHMAN, individually and on behalf
of all others similarly situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No. 22CV405052

CLASS ACTION

COMPLAINT

1 Plaintiffs David Landfair and Samuel M. Gershman (“Plaintiffs”), individually and on
2 behalf of all others similarly situated, by and through their attorneys, make the following allegations
3 pursuant to the investigation of their counsel and based upon information and belief, except as to
4 allegations specifically pertaining to themselves, which are based on personal knowledge.

5 **NATURE OF THE ACTION**

6 1. This is a class action suit brought against Defendant Google LLC (“Google” or
7 “Defendant”) for its unlawful retention of Plaintiffs’ and its other New York and Minnesota
8 customers’ personally identifiable information, including their names, addresses, credit card
9 information, and video rental history in violation of the New York Video Consumer Privacy Act,
10 N.Y. General Business Law (“GBL”) §§ 670-675 (“NYVCPA”) and Minnesota’s M.S.A.
11 § 325I.01-03 (the “Minnesota Statute”).

12 2. Google is a leading technology company that rents videos for streaming to
13 consumers through its Google Play platform.

14 3. Google maintains a digital record system that details the rental histories of every
15 customer that rents a video from Google. Google also maintains records containing its customers’
16 billing addresses.

17 4. As a result, Google maintains a digital dossier on millions of consumers throughout
18 New York and Minnesota. These records contain not only its customers’ credit card numbers and
19 billing/contact information, but also a detailed account of its customers’ video rental histories.

20 5. In recognition of the fact that companies who rent digital media – like Google – must
21 collect certain confidential and sensitive consumer information with respect to personal viewing
22 habits, New York and Minnesota law requires such companies to “destroy personally identifiable
23 information as soon as practicable.” GBL § 673(5); M.S.A. § 325I.02(6).

24 6. However, in direct contravention of the protections afforded to New York consumers
25 under the NYVCPA, Google maintains and stores its customers’ names, credit card numbers, billing
26 and contact information, and most importantly, sensitive video rental histories for an indefinite
27 period of time.

28 7. Accordingly, Google has knowingly retained the “personally identifiable

1 information” and sensitive video rental histories of millions of New York and Minnesota
2 consumers, in violation of New York and Minnesota law.

3 8. Plaintiffs bring this action on behalf of themselves and two separate classes of all
4 people in New York and Minnesota whose personally identifiable information and sensitive video
5 rental histories were retained by Google.

6 **THE PARTIES**

7 9. Plaintiff David Landfair lives and is domiciled in Brooklyn, New York.

8 10. In July 2016, Mr. Landfair rented movies from Google.

9 11. In connection with that rental, Google collected Mr. Landfair’s name, address, and
10 credit card information.

11 12. As of at least June 22, 2022, Mr. Landfair’s account history still displayed the titles
12 of the videos he rented, as well as the date he rented them and the price he paid for them.

13 13. Plaintiff Samuel Gershman lives and is domiciled in Rochester, Minnesota.

14 14. In November 2015, Plaintiff Gershman rented movies from Google.

15 15. In connection with that rental, Google collected Mr. Gershman’s name, address, and
16 credit card information.

17 16. As of at least June 21, 2022, Mr. Gershman’s account history still displayed the titles
18 of the videos he rented, as well as the date he rented them and the price he paid for them.

19 17. Defendant Google LLC is a California corporation with its headquarters in Mountain
20 View, California. Google does business throughout California, New York, and Minnesota.

21 **JURISDICTION AND VENUE**

22 18. This Court has subject matter jurisdiction over this class action. This Court has
23 personal jurisdiction over the parties because Defendant, at all times relevant hereto, has
24 systematically and continually conducted, and continues to conduct, business in this State.

25 19. Venue is proper in this Court pursuant to Civil Code §§ 395 and 395.5. Defendant
26 conducts business in this County and throughout the State of California and its principal place of
27 business is in this County.

STATEMENT OF FACTS

The Federal Video Privacy Protection Act and Digital Dossiers

20. The desire to keep video rental history records private led Congress to enact the Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (“VPPA”). Inspired by the release of video rental records of Supreme Court Justice Nominee Robert H. Bork and his family, Congress promulgated the Act to explicitly preserve United States citizens’ right to privacy in their video rental histories.

When the VPPA was introduced, Senator Paul Simon noted that: There is no denying that the computer age has revolutionized our world. Over the past 20 years we have seen remarkable changes in the way each one of us goes about our lives. Our children learn through computers. We bank by machine. We watch movies in our living rooms. These technological innovations are exciting and as a nation we should be proud of the accomplishments we have made. Yet, as we continue to move ahead, we must protect time honored values that are so central to this society, particularly our right to privacy. The advent of the computer means not only that we can be more efficient than ever before, but that we have the ability to be more intrusive than ever before. *Every day Americans are forced to provide to businesses and others personal information without having any control over where that information goes. These records are a window into our loves, likes, and dislikes.*

S. Rep. No. 100-599 at 7-8 (1988) (emphasis added).

21. One of the original drafters of the VPPA, Senator Patrick Leahy, remarked that “the trail of information generated by every transaction is now recorded and stored in sophisticated record-keeping systems is a new, more subtle and pervasive form of surveillance.” S. Rep. No. 100-599 at 8 (1988).

22. In recognition of the sensitivity of the video renting information, the VPPA requires video tape service providers, like Google, to destroy “personally identifiable information as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected ...” 18 U.S.C. § 2710(e).

23. However, the VPPA differs from the NYVCPA and the Minnesota Statute in that it only provides a private right of action for the wrongful *disclosure* of personally identifiable

1 information, and not failure to destroy it. *See* 18 U.S.C. § 2710(c) (providing private right of action
 2 for a “violation of this section” immediately after the disclosure prohibitions in section (b), but not
 3 listing the destruction requirements until section (e)).

4 ***The New York Video Consumer Privacy Act and Minnesota Statute § 325I.02(6)***

5 24. On the heels of Congress having passed the VPPA, the New York Legislature passed
 6 the NYVCPA in 1993 “to protect the personal privacy of individuals and their families who rent
 7 video cassette tapes and movies and similar audio visual materials.” GBL § 671.

8 25. In his sponsor memorandum, Assemblyman Anthony J. Genovesi noted:

9 Video lists have enormous commercial utility, which adds to the
 10 likelihood that an individual’s entertainment preferences will be
 11 disclosed. Mailing lists are easily devised based on categorizing
 12 an individual’s viewing habits as documented by video retail
 13 establishments’ records. For example, catalog companies and
 14 direct mail sales companies are naturally interested in obtaining
 lists of people who rent children’s films, physical fitness films,
 adventure films, or adult films.

14 Exhibit A, Sponsor Memo at 3.

15 26. In furtherance of those concerns, like the VPPA, the NYVCPA requires that video
 16 tape service provides, like Google, “destroy personally identifiable information as soon as
 17 practicable, but no later than one year from the date the information is no longer necessary for the
 18 purpose for which it was collected” GBL § 673(5).

19 27. However, unlike the VPPA, the NYVCPA explicitly provides a private right of
 20 action to enforce that statutory requirement. *See* GBL § 675(1).

21 28. Specifically, under the NYVCPA, the private right of action is located at the end of
 22 the Act and extends to all “violation[s] of this *article*,” which refers to Article 32 of the General
 23 Business Law, *i.e.*, the NYVCPA.

24 29. This deviation from the VPPA is not an accident. Indeed, Assemblyman Genovesi
 25 specifically noted in his sponsor memorandum that due to the shortcomings of the VPPA, “a
 26 separate state law is needed in New York to give her citizens meaningful protection from unwanted
 27 intrusions.” Ex. A, Sponsor Memo at 3.

1 30. Minnesota’s law governing video rental records are similar to the NYVCPA.

2 31. Minnesota law has the same language found in the NYVCPA, requiring video tape
3 service provides, like Defendant, to “destroy personally identifiable information as soon as
4 practicable, but no later than one year from the date the information is no longer necessary for the
5 purpose for which it was collected” M.S.A. § 325I.02(6).

6 32. And, like NYVCPA, the Minnesota Statute explicitly provides a private right of
7 action to enforce that statutory requirement. *See id.* at § 325I.03.

8 33. Specifically, under the Minnesota Statute, “a consumer who prevails or substantially
9 prevails in an action brought under this section is entitled to a minimum of \$500 in damages,
10 *regardless of the amount of actual damage proved*, plus costs, disbursements, and reasonable
11 attorney fees.” *Id.* (emphasis added).

12 34. As a result, by its plain terms, Minnesota Statute § 325I.03 affords greater
13 protections than does VPPA.

14 ***A Brief Overview of Renting Videos Through Google Play***

15 35. Google allows consumers to rent videos to instantly stream on their devices.

16 36. Consumers must first create an account with Google which requires them to input
17 their name and date of birth.

18 37. After creating a Google account, renting a video through Google Play is a four-step
19 process. First, the customer searches Google Play’s selections by using its interface. Second, after
20 the customer has identified a video that she wishes to rent, the customer clicks that video and then
21 clicks the “rent” button, which prompts him to enter his Google account username and password.
22 Third, the customer enters his Google account username and password and clicks “rent,” which then
23 prompts users to enter their credit card information, including their billing address. Fourth, once
24 this information is entered, Google charges the credit card on file and the user then begins renting
25 the video.

26 38. Once the video is rented it is accessible to the customer in the “rented” section of the
27 Google Play interface.

28 39. The customer must watch the video within 30 days of the rental and has 48 hours

1 from first viewing the video to complete it.

2 40. After 30 days of the rental, or after 48 hours from first viewing the video, whichever
3 comes earlier, the video is no longer accessible to the customer.

4 41. At no time does Google obtain the consent of its customers to retain their personally
5 identifiable information.

6 42. Google requires customers to use only credit or debit cards to rent videos from
7 Google.

8 43. Google Play's terms and conditions provide that all transactions are final.

9 44. Google offers a refund only within 7 days of the rental, or, if technical problems
10 prevent or unreasonably delay the video's delivery, 65 days of the rental.

11 ***Google Systematically Violates the NYVCPA and Minnesota Statute § 325I.02(6)***

12 45. With every rental transaction, Google collects, stores and maintains its customers'
13 name, credit and debit card information, billing address, and video rental history for an indefinite
14 period of time.

15 46. The video rental histories that Google stores include every video that the customer
16 has ever rented through Google Play, as well as information which identifies the customer as having
17 requested or obtained specific video materials or services.

18 47. In light of the fact that its customers' rental transactions are necessarily completed
19 within 30 days from the date of rental, and given Google's policy not to provide refunds for charges
20 that are over 65 days old, Google systematically violates the NYVCPA and the Minnesota Statute
21 by storing and maintaining its customers' "personally identifiable information," as that term is
22 defined by the statutes, for longer than 65 days.

23 **CLASS ACTION ALLEGATIONS**

24 48. Plaintiff Landfair seeks to represent a class of all New York residents who (a) rented
25 a video from Google through Google Play wherein (b) Google retained for more than 65 days their
26 personally identifiable information, including information that identifies the person as having
27 requested or obtained specific video materials or services, and (c) without their consent (the "New
28 York Class").

1 49. Plaintiff Gershman seeks to represent a class of all Minnesota residents who (a)
2 rented a video from Google through Google Play wherein (b) Google retained for more than 65
3 days their personally identifiable information, including information that identifies the person as
4 having requested or obtained specific video materials or services, and (c) without their consent (the
5 “Minnesota Class”).

6 50. Members of the Classes are so numerous that their individual joinder herein is
7 impracticable. On information and belief, members of the Class number in the millions. The
8 precise number of Class members and their identities are unknown to Plaintiffs at this time but may
9 be determined through discovery. Class members may be notified of the pendency of this action by
10 mail and/or publication through the distribution records of Defendant.

11 51. Common questions of law and fact exist as to all Class members and predominate
12 over questions affecting only individual Class members. Common legal and factual questions
13 include, but are not limited to, whether Defendant has violated the NYVCPA and the Minnesota
14 Statute by storing and maintaining personally identifiable information, including video rental
15 histories for longer than 65 days; and whether Class members are entitled to statutory damages for
16 the aforementioned violations.

17 52. The claims of the named Plaintiffs are typical of the claims of the Classes because
18 the named Plaintiffs, like all other Class members, rented videos from Google through Google Play
19 and had their personally identifiable information, including video rental histories stored and
20 maintained by Google for longer than 65 days.

21 53. Plaintiffs are an adequate representative of the Classes because their interests do not
22 conflict with the interests of the Class members they seek to represent, they have retained
23 competent counsel experienced in prosecuting class actions, and they intend to prosecute this action
24 vigorously. The interests of Class members will be fairly and adequately protected by Plaintiffs and
25 their counsel.

26 54. The class mechanism is superior to other available means for the fair and efficient
27 adjudication of the claims of Class members. Each individual Class member may lack the resources
28 to undergo the burden and expense of individual prosecution of the complex and extensive litigation

1 necessary to establish Defendant’s liability. Individualized litigation increases the delay and
 2 expense to all parties and multiplies the burden on the judicial system presented by the complex
 3 legal and factual issues of this case. Individualized litigation also presents a potential for
 4 inconsistent or contradictory judgments. In contrast, the class action device presents far fewer
 5 management difficulties and provides the benefits of single adjudication, economy of scale, and
 6 comprehensive supervision by a single court on the issue of Defendant’s liability. Class treatment
 7 of the liability issues will ensure that all claims and claimants are before this Court for consistent
 8 adjudication of the liability issues.

9 55. Plaintiffs bring their claims in this action individually and on behalf of members of
 10 the Classes against Defendant.

11 **COUNT I**
 12 **Violation of the New York Video Consumer Privacy Act,**
 13 **N.Y. GBL §§ 670-675**

14 56. Plaintiff Landfair repeats the allegations contained in the foregoing paragraphs as if
 15 fully set forth herein.

16 57. Plaintiff Landfair brings this claim individually and on behalf of the members of the
 17 proposed New York Class against Defendant.

18 58. Google is a “video tape service provider” as defined by the NYVCPA, because it
 19 “[e]nage[s] in the business of rental of prerecorded video cassette tapes or similar audio visual
 20 materials.” GBL § 672(4).

21 59. Plaintiff Landfair is a “consumer” as defined by the NYVCPA, because he is a
 22 “renter ... of goods or services from a video tape service provider.” GBL § 672(1).

23 60. The NYVCPA requires video tape service providers “destroy personally identifiable
 24 information as soon as practicable, but no later than one year from the date the information is no
 25 longer necessary for the purpose for which it was collected” GBL § 673(5).

26 61. The NYVCPA defines “personally identifiable information” as “any information
 27 which identifies a person as having requested or obtained specific video materials or services from a
 28 video tape service provider.” GBL § 672(1).

62. As Google’s customer video rental transactions are completed within 30 days of the rental (as the video is no longer accessible to the customer after that time), and Google does not provide refunds for charges that are more than 65 days old, it is not necessary for Google to store and maintain Plaintiff’s and the New York Class’s personally identifiable information and personal video rental histories for longer than 65 days.

63. Accordingly, and in violation of GBL § 673(5), Google has failed to destroy its customers’ personally identifiable information as soon as practicable after it was no longer necessary for the purpose for which it was collected.

64. Nonetheless, Google has stored and maintained Plaintiff Landfair’s personally identifiable information, as that term is defined by the NYVCPA, for well over 65 days since he rented a video from Google, through Google Play, in July 2016.

65. Further, Google does not have a policy in place to timely destroy “personally identifiable information,” as required by the NYVCPA.

66. Pursuant to GBL § 675, Plaintiff Landfair and the New York Class have been injured by the violations of GBL § 673(5), and seek damages of not less than \$500 each, regardless of the amount of actual damage proved, plus costs, disbursements, and reasonable attorneys’ fees.

COUNT II

Violation of the Minnesota Statute M.S.A. § 325I.01-03

67. Plaintiff Gershman repeats the allegations contained in the foregoing paragraphs as if fully set forth herein.

68. Plaintiff Gershman brings this claim individually and on behalf of the members of the proposed Minnesota Class against Defendant.

69. Defendant is a “videotape service provider” as defined by M.S.A. § 325I01(5), because it “[e]nage[s] in the business of rental of prerecorded videocassette tapes or similar audiovisual materials.”

70. Plaintiff Gershman is a “consumer” within the meaning of the statute because he is a “renter ... of goods or services from a videotape service provider.” *Id.* at § 325I01(2).

71. The Minnesota Statute requires video tape service providers “destroy personally identifiable information as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected” M.S.A. § 325I02(6).

72. The Minnesota Statute defines “personally identifiable information” as “information that identifies a person as having requested or obtained specific video materials or services from a videotape service provider.” M.S.A. § 325I01(3).

73. As Google’s customer video rental transactions are completed within 30 days of the rental (as the video is no longer accessible to the customer after that time), and Google does not provide refunds for charges that are more than 65 days old, it is not necessary for Google to store and maintain Plaintiff’s and the Class’s personally identifiable information and personal video rental histories for longer than 65 days.

74. Accordingly, and in violation of Minnesota law, Defendant has failed to destroy its customers’ personally identifiable information as soon as practicable after it was no longer necessary for the purpose for which it was collected.

75. Nonetheless, Defendant has stored and maintained Plaintiff Gershman’s personally identifiable information for well over 65 days since he rented a video from Defendant.

76. Further, Defendant does not have a policy in place to timely destroy “personally identifiable information,” as required by Minnesota law.

77. Plaintiff Gershman and the Minnesota Class have been injured by the violations of M.S.A. § 325I01, and seek damages of not less than \$500 each, regardless of the amount of actual damage proved, plus costs, disbursements, and reasonable attorneys’ fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, seek judgment against Defendant, as follows:

- a. Determining that this action is a proper class action;
- b. For an order certifying the Classes, naming Plaintiffs as the representative of the

- 1 Classes, and naming Plaintiffs' attorneys as Class Counsel to represent the Classes;
- 2 c. For an order declaring that the Defendant's conduct violates the statutes referenced
- 3 herein;
- 4 d. For an order finding in favor of Plaintiffs and the Classes on all counts asserted
- 5 herein;
- 6 e. For statutory damages in amounts to be determined by the Court and/or jury;
- 7 f. For prejudgment interest on all amounts awarded;
- 8 g. For an order awarding Plaintiffs and the Classes their reasonable attorneys' fees and
- 9 disbursements, expenses, and costs of suit.

10 **DEMAND FOR TRIAL BY JURY**

11 Plaintiffs hereby demand a trial by jury of all issues so triable.

12

13 Dated: September 30, 2022

Respectfully submitted,

14 **BURSOR & FISHER, P.A.**

15

16 By: 

Joel D. Smith

17

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EXHIBIT A

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Assemblyman Anthony J. Genovesi
New York State Assembly
MEMORANDUM IN SUPPORT OF LEGISLATION

submitted in accordance with Assembly Rule III, Section 1 (e)

Bill Number: Assembly 5904 Senate _____ Memo on original draft
_____ Memo on amended bill

Sponsors: Assemblymembers Anthony J. Genovesi

Senators _____

TITLE:

An act to amend the general business law, in relation to protecting the privacy of consumers renting or purchasing video cassette tapes or similar audio visual materials.

PURPOSE OR GENERAL IDEA OF BILL:

The purpose of this bill is to protect the personal privacy of consumers who purchase or rent prerecorded video cassette tapes or similar audiovisual materials by prohibiting public disclosure of information that could reveal the identity of such individuals except with the consumer's consent or pursuant to certain exceptions, such as a court order. Exceptions to the prohibition are designed to avoid unreasonably restricting the ability of video retail establishments to retain such information as is needed to carry on their businesses.

SUMMARY OF SPECIFIC PROVISIONS:

This bill would add a new Article 31 to the General Business Law, entitled the Video Consumer Privacy Act. The bill would prohibit video tape service providers from disclosing to any person personally identifiable information concerning the consumer, including information which identifies a person as having rented or obtained specific video materials or services from a video tape service provider.

Exceptions to the general disclosure prohibition would be made where the disclosure is: to the consumer or is made with the informed, written consent of the consumer given at the time the disclosure is sought; to any person if the disclosure is incident to the ordinary course of business of the video tape service provider as defined in the bill; to a grand jury pursuant to a grand jury subpoena; pursuant to a court order in a civil case upon a showing of compelling need or in a criminal case upon a showing of legitimate need and upon motion and an opportunity to appear to the consumer; to a law enforcement agency pursuant to a lawfully obtained warrant; or to a court pursuant to a civil action for conversion commenced by the video tape service provider or to enforce collection of fines for overdue or unreturned video tapes, and then only to the extent necessary to establish the fact of the rental.

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Old video consumer records must be destroyed within one year of the information no longer being necessary or requested.

Violators of the bill's provisions would be liable to the consumer for damages and could also be subject to an action brought by the Attorney General for injunctive relief and a fine of up to \$1,000.

EFFECTS OF PRESENT LAW WHICH THIS BILL WOULD ALTER:

Adds a new Article 31 to the General Business Law.

JUSTIFICATION:

Retail establishments that devote all or part of their business to the sale or rental of pre-recorded video tapes and movies have become big business. Almost half of all U.S. households are equipped with a video cassette recorder. Americans spend hundreds of millions of dollars on renting and buying movies for home viewing. Thousands of retail outlets rent and sell video cassettes both to people who enroll as "club members" and to members of the public generally. Such establishments commonly keep detailed computerized records of the names and addresses of individual customers along with the titles of the movies they have rented or purchased. Thus, an individual's entire history of rentals or purchases of video tapes or movies for personal entertainment can be obtained at the press of a button.

The unauthorized release of such information raises serious privacy and First Amendment considerations. The problem was graphically illustrated during the course of two recent highly-publicized public proceedings: When Lieutenant Oliver North took the witness stand in the Iran-Contra hearings, a list of movies rented by him and his family was obtained and made public. Similarly, when Judge Robert Bork was the subject of a controversial hearing for a Supreme Court judgeship, his tastes in movies were disclosed and published by a Washington weekly newspaper, which printed a list of 146 titles of videos rented over the prior year and a half by himself or family members.

Historically, during the McCarthy era, investigators obtained lists of books checked out of public libraries and used them against a number of people. Today in New York State, persons borrowing books from libraries are protected from such conduct by CPLR 4509, which prohibits the dissemination of personally identifying details contained in library circulation records except under specific circumstances. Similarly, personally identifiable information concerning subscribers of cable television channels is protected from dissemination under federal law by the Cable Privacy Protection Act, 47 USC 551 et seq.

Video retail establishment records containing personally identifying information certainly present the same potential for abuse as library and cable television records. The Federal government recognized the privacy problems presented by the video age by enacting the Video Privacy Protection Act of 1988, P.L. 100-618. Unfortunately, that law is flawed in that it allows disclosure of personally identifiable information to any

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person if the disclosure is only of the name and address of the consumer and the video consumer has been given the opportunity to prohibit such disclosure. An even more serious flaw is the new law's exception for commercial mailing lists and similar purposes: "the subject matter of such materials may be disclosed if the disclosure is for the exclusive use of marketing goods and services directly to the consumer." (18 U.S.C. 2710(b)(2) (D) (ii), P.L. 100 - 618 [1988]).

Video lists have enormous commercial utility, which adds to the likelihood that an individual's entertainment preferences will be disclosed. Mailing lists are easily devised based on categorizing an individual's viewing habits as documented by video retail establishments' records. For example, catalog companies and direct mail sales companies are naturally interested in obtaining lists of people who rent children's films, physical fitness films, adventure films, or adult films.

The Department of Law has received dozens of complaints from consumers who have received unsolicited direct mail advertisements for pornographic home video movies, containing explicit descriptions of the movies' contents and suggestive pictures. Some of the solicitations were addressed to the children of the household. It is suspected that a source of these direct mail companies' access to individuals' name and addresses has been video clubs, who disclose lists of customers. The Federal law does nothing to prohibit such use of video establishments' records, since it has a broad mailing list exception. Thus, a separate state law is needed in New York to give her citizens meaningful protection from unwanted intrusions and to cover those video tape service providers which are not engaged in or are affecting interstate commerce.

This bill would prevent the unauthorized sale or other disclosure of personally identifiable information concerning a consumer's movie purchases or rentals. An aggrieved individual could bring a lawsuit under this bill and obtain a minimum of \$500 in damages if successful, along with costs and attorney's fees. Violation of the act would also subject the violator to an action for injunctive relief brought by the Attorney General, and to a fine of up to \$1,000 per violation. The bill would ensure that video tape service providers will be able to pursue normal business operations by using computerized information as needed for inventory or other legitimate purposes in-house, or to disclose personally identifiable information with the express written consent of the consumer.

Consumers should be entitled to view movies and tapes of their own choosing within their own homes without their personal choices becoming public or finding their way to a pornographer's mailing list. They should not be put in the position of self-censorship out of concern over public disclosure of their choices of video movies. Enactment of this bill would mean that video consumers could rent or purchase video tapes and movies without fear that information connecting them or members of their families to any particular titles could become public or appear on an unwanted mailing list.

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